IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL APPLICATION NO. 10937 OF 1998

with

FIRST APPEAL No 2125 of 1992

with

FIRST APPEAL No 1811 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AHMEDABAD MUNICIPAL TRANSPORT SERVICE,AHMEDABAD

Versus

KOKILABEN WD/0 KIRTIKUMAR NAR-HARIPRASAD PANDYA

Appearance:

1. First Appeal No. 2125 of 1992
MR MG NAGARKAR for Petitioner
MR KF DALAL for Respondent No. 1

2. First AppealNo 1811 of 1992

MR KF DALAL for Petitioner
NOTICE SERVED for Respondent No. 1
MR MG NAGARKAR for Respondent No. 2
MR KF DALAL for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA
and
MR.JUSTICE H.K.RATHOD

Date of decision: / /2000

COMMON CAV JUDGEMENT

[PER : D.C. SRIVASTAVA, J.]

#. These two First Appeals and Civil Application are proposed to be disposed of by a common judgment and order.

#. The prayer in the Civil Application aforesaid is for expediting hearing of the above two appeals and in the alternative for permission to withdraw minimum amount of Rs.40,000/- to meet with expenses and illness expenses of the appellants. This civil application has become infructuous because both the appeals have been finally heard and are kept reserved for delivery of judgment. As such, the Civil Application is rejected as infructuous.

#. An award was rendered by the Motor Accident Claim Tribunal, Ahmedabad in MACP No.359 of 1987 on 21st April, 1992. Feeling aggrieved against the award, Ahmedabad Municipal Corporation has preferred First Appeal No.2125 of 1992, whereas the claimants of the MACP aforesaid have preferred First Appeal No.1811 of 1992 claiming enhancement of the compensation awarded by the Tribunal.

#. These two appeals arise out of following brief facts.

#. The heirs and legal representatives of the deceased Kirtikumar Narhariprasad Pandya filed the above MACP case alleging that the deceased was going on his scooter No. GUI 3113 on 15-5-1987 to his office. He met with an accident near L.G. Hospital four cross road with Ahmedabad Municipal Transport Services [`AMTS' for short] Bus No. GTH 8828 driven by the driver, the opponent No.1 before the tribunal. As a result of the

accident, the deceased Kirtikumar instantaneously died at the spot. He was working as Assistant Accountant in the Ambica Mills. On the date of accident, he was drawing salary of Rs.2836.68 ps. It was alleged that the accident took place due to rash and negligent driving of the AMTS bus by its driver the Opponent No.1. Compensation under various heads was claimed by the claimants. The claimant No.1 is the widow of the deceased, whereas, the claimants No.2 & 3 are the sons of the deceased. They claimed total compensation of Rs.4,20,000/-.

#. The driver opponent No.1 did not file any written statement. However, AMTS Corporation opponent no.2 filed written statement before the tribunal wherein, it was denied that the accident took place on the date, time and place alleged by the claimants. They also denied everything including the income of the deceased. It was in the alternative alleged that the deceased was going on his scooter with an excessive speed and the accident occurred because of rash and negligent driving by the deceased. On the contrary, it was alleged that the driver of the bus opponent No.1, was driving the vehicle at moderate speed. The plea of contributory negligence was also raised by the Corporation. It was also pleaded that the compensation claimed was highly excessive and exaggerated.

#. After considering the entire evidence on record, the tribunal found that the accident took place on the date, time and place alleged by the claimants and AMTS bus aforesaid was involved in the vehicular accident. It further found that the driver - opponent No.1 was driving the above bus rashly and negligently. It further found that the deceased was also negligent in driving his scooter. Ultimately, the tribunal found that the deceased was negligent to the extent of 30 %, whereas the driver of the AMTS bus was negligent to the extent of 70%. The tribunal calculated compensation under various heads and found that in all, the claimants are entitled to compensation of Rs.1,99,100/-. On account of the contributory negligence of the deceased, 30 % of the total amount of compensation was reduced and in that way, net compensation amounting to Rs.1,40,370/- was awarded to the claimants together with 12 % per annum interest from the date of the petition till realization. There was no order for costs.

#. It is against this award of the tribunal that the Corporation - Opponent No.2 in the petition has preferred the appeal alleging that the deceased was solely

responsible for the accident, hence the Corporation is not liable to pay any compensation. The claimants on the other hand preferred the appeal claiming enhancement of compensation under various heads.

#. The learned counsel for the parties viz. the appellants and respondents in both appeals were heard and the award of the tribunal was examined, so also the material on record. The learned counsel for the appellants in First Appeal No.2125 of 1992 representing Ahmedabad Municipal Transport Service Corporation argued that the driver of the vehicle owned by the Corporation was not negligent rather he was driving the vehicle carefully and cautiously at moderate speed, hence, there can be no liability of the Corporation to pay any compensation to the heirs of the deceased. The learned counsel for the appellants in the other appeal on the other hand contended that it was the driver of the AMTS bus who was driving the vehicle rashly and negligently, hence, he is liable to the extent of 100 % and it was not because of contributory negligence of the deceased that the accidentt took place inasmuch as the deceased was driving his scooter cautiously at a moderate speed. Finding of the tribunal however is that the driver of the bus and the deceased driving the scooter were both negligent. Plea of contributory negligence was therefore upheld by the tribunal. It is to be examined therefore in the first instance whether this finding of the tribunal can be assailed and can be held to be incorrect.

##. The learned counsel for the claimants contended that because the bus is heavy vehicle, it will be presumed that the driver of the bus was wholly negligent and driving the vehicle in rash manner. In our opinion, no such presumption of fact can be drawn that the driver of the heavy vehicle must be necessarily held to be wholly responsible for the accident or that he was driving heavy vehicle in rash and negligent manner. The finding of the tribunal about contributory negligence to our mind, does not require any interference because it is supported by evidence on record as well as from the circumstances of the case.

##. The place of accident was near the LG Hospital cross road. Panchnama Exh.31, complaint Exh.30 and the statements of Navinbhai and Bhartendu Bhatt Exh. 38 and 33 respectively clearly indicate that it was a case of contributory negligence. It has come in evidence that the accident occurred near four cross road of LG Hospital. It is also in the evidence that there was speed braker near the four cross road of LG Hospital.

Exh.31 is the Panchnama which shows exact topography of the scene of accident. No doubt, Naginbhai could not say anything about the speed of the bus at the time of accident because the bus came from the cross direction. However, the eye witness standing on the road could not be expected to assess at what speed the bus was being driven by the driver. However, there is extrinsic evidence that it was a cross road where the accident took place. It is also in the evidence that there was speed braker near the place of accident and as such, it can safely be inferred that for crossing the speed braker, the driver of the bus must have slowed its speed. There is no evidence that the speed of the bus was so excessive that while crossing the speed braker, it jumped the speed braker. The bus was going from Rambaug to LG Hospital, whereas the scooter was going from Krishnabaug to Machchhi Pir. It is also in the evidence and it was found by the tribunal from the evidence that the bus had crossed substantial portion of the four cross road and it was proceeding towards the LG Hospital. It was further found by the tribunal from the evidence that the middle portion of the scooter dashed against the front portion of the bus, as a result of which, the scooterist was knocked down and ultimately succumbed to injuries. It is also in evidence that after the collision, the scooterist was thrown away and he fell near garage which was situated near the cross road. It is also in the finding of the tribunal that the scooter was going from right side, whereas the driver was driving his bus on the cross road towards LG Hospital side. When such was the topography of the place of accident, possibility of contributory negligence can not be ruled out. The scooterist driving his scooter from right side had duty to see towards his left and right of cross road, whether any motor vehicle was coming or not or whether any obstruction was there or not so that the collision could be averted. Likewise, it was the duty of the bus driver also to see not only towards his front but also towards his left and right when he was driving his bus through the cross road so that he could have averted untoward accident with his vehicle. It is further in evidence that the driver of the bus applied brakes. It is also in the Panchnama that consequent upon applying brake by the driver, wheel marks were noticed at the scene of accident. If it was cross road through which, the driver of the bus was passing and there was also speed braker, it can be inferred on the basis of the common sense that the driver of the bus could not have driven the bus at very excessive speed rather, it can be said that he must have cautiously driven the vehicle at moderate speed. This inference finds further support that the driver of

the bus was cautious inasmuch as he applied brake to the bus and application of brake was so sudden that though the bus could not be stopped immediately, yet it had travelled some distance and wheel marks of the bus were noticed at the time of preparation of Panchnama. As against this, no evidence of application of brake by the scooter driver viz. the deceased was noticed in the Panchnama. The deceased was thrown near the cross road adjoining the garage. Consequently, it cannot be said that the bus was driven at an excessive speed. If it would have been driven at excessive speed, the deceased would have been thrown away at sufficiently longer distance and not near the vicinity of the cross road adjoining the garage.

##. Rashness is not to be determined only with reference to excessive speed. Of course, excessive speed of motor vehicle is one of the factors on which it can be said that it was driven rashly. However, the driver may be expert and he may be having control over the steering wheel and he can by his experience and caution, apply brake and keep the vehicle under his control. Since it was not a case of rash driving, we are unable to agree with the tribunal that the driver of the bus was driving the same in rash manner.

##. So far negligence is concerned, we agree with the finding of the tribunal that both the scooterist viz. the deceased and the bus driver were negligent. If the bus driver, had duty to see not only towards front but also towards right and left near the cross road and if he failed to discharge his duties, it can be said that as an ordinary prudent and reasonable man as driver, he did not take care which was expected of an ordinary prudent man at the time of accident sitting on the steering wheel of a heavy vehicle. Likewise, for the deceased who was coming from the right side of the cross road, it was his duty to see not only towards his front but also towards his right and left to see that the road was clear to enable him to pass through cross road. It seems this duty to take care was not observed by the scooterist otherwise, the accident could have been averted. He was driving light vehicle and it was very easy for him to stop the same noticing that a heavy vehicle was coming either from his right side or left side on the cross road. It also appears that he did not apply brake to his scooter. Under these circumstances, it can be safely said that the bus driver as well as the scooter driver were both negligent and the accident occurred due to contributory negligence of the bus driver and the deceased. The finding on the point recorded by the

tribunal therefore does not require any interference.

##. Then comes the question of apportionment of the liability. According to the tribunal, the driver of the bus was negligent to the extent of 70 %, whereas the scooterist was negligent to the extent of 30 %. No reason has been recorded by the tribunal for this percentage as to how it was worked out. From what has been discussed above, we are of the view that both the driver of the bus as well as the deceased were equally responsible for the accident. The greater liability or greater degree of negligence cannot be attributed to the driver of the heavy vehicle merely because he was driving heavy vehicle. On the facts and circumstances of the case and evidence discussed above, we are of the view that the driver took all precautions to avert the accident. He applied the brake. He could not have driven the bus at excessive speed near four cross road and also near the speed braker. The scooterist, on the other hand, did not take reasonable care expected of an ordinary and prudent man while driving two wheeler and he did not take precaution to see towards front and towards his left and right nor he did apply brake to his scooter to allow the heavy vehicle to pass through cross road so as to enable him to reach his destination safely. In such circumstances and looking to the evidence on record and topography of the scene of occurrence, we are of the view that the liability of the bus driver and the scooter driver should be equal, hence, we assess the liability of the bus driver to the extent of 50 % and that of the deceased to the extent of 50 %.

##. With the above assessment of liability, we propose to examine the award regarding the compensation awarded by the tribunal. Under various heads, the tribunal has awarded compensation. It is in evidence that the deceased was employed as the Assistant Accountant in Ambica Mills and was drawing salary of Rs.2836.68 ps per month. The tribunal has assessed that the deceased could have spent 50 % towards his personal expenses and 50 % would have been made available to the claimants. The learned counsel for the claimants representing the appellants in one of the appeals and respondents in other appeal contended that personal expenses of the deceased should not have been calculated at 50 % rather it should have been one third. We do not find any force in this contention. The deceased was an Asstt. Accountant in Ambica Mill. In order to attend his office, he was maintaining his scooter. Naturally his personal expenses could have exceeded because of maintenance of scooter and in purchase of petrol etc for the scooter. Other

expenses befitting his status are also required to be taken into consideration. As against this, the claimants are widow of the deceased and two sons. On the date of presenting the claim petition, one son of the deceased was aged about 21 years and the other was aged about 19 years. They had attained majority and they could expect a respectable and suitable job for their survival. As such, at this stage, it cannot be said that two third of total salary of the deceased would have been kept reserved for his wife and two sons. In these circumstances of the case, the finding of the tribunal that the deceased would have kept half of his salary etc for his personal use does not appear to be unreasonable, hence no interference on this count is needed. If 50 % of the salary was to be utilized by the claimants, it comes to Rs.1400/- per month. The deceased was aged about 51 years of age and the retirement age in Ambica Mill is 60 years. Looking to the age of the deceased, multiplier of 10 was correctly chosen by the tribunal. Consequently, annual dependency benefit with multiplier of ten was worked out to Rs.1,68,000/-. This will be the loss of dependency benefits to the claimants to which, they are rightly entitled and were rightly held to be entitled by the tribunal. The tribunal has awarded expectancy of loss of life to a sum of Rs.10,000/-. This is also reasonable assessment. An amount of Rs.10,000/was awarded towards consortium to the widow. The medical expenses amounting to Rs.3,600/- were awarded on account of purchase of three injections at the rate of Rs.1200/per injection which were given to the deceased. The tribunal has rightly placed reliance upon the oral testimony of the widow who incurred this expenditure. For pain and sufferings to the deceased, a sum of Rs.5,000/- was also reasonably awarded by the tribunal. Placing reliance on the statement of the widow, the tribunal awarded a sum of Rs.500/- towards taxi fare paid by her in attending hospital etc. Funeral expenses amounting to Rs.2,000/- awarded by the tribunal cannot be said to be excessive.

##. However, at this stage, the other appeal No.1811 of 1992 is to be considered where the prayer for enhancement of the compensation under various heads has been made. We have already held that the assessment of the tribunal that personal expenses of the deceased would have been 50 % of his salary is not unreasonable. Consequently, on this count, we cannot agree with the contention of the learned counsel for the claimants that the personal expenses of the deceased should have been worked out at one third only.

##. The tribunal was justified in not permitting the claim of Rs.500/- per year towards medical expenses. This amount could be permitted only if medical bills could be produced. There is no evidence that the deceased was entitled to Rs.500/- per year towards medical expenses. Nor anything else in evidence to this effect was produced from the side of the claimants. The clerk of the Ambica Mill who was examined as witness of the claimants, did not state about the provision for medical expenses at the rate of Rs.500/- per year. Consequently, this amount was rightly refused by the tribunal. No relevant record showing such payment every year was produced by the clerk of the Ambica Mill. We therefore, do not agree with the contention of the learned counsel for the claimants that compensation of Rs.500/- per year towards medical expenses should have been awarded by the tribunal. The medical expenses actually incurred by the claimants were already granted by the tribunal.

##. It was however argued by the learned counsel for the claimants that the tribunal fell in error in not taking into account the bonus to which the deceased was entitled at the rate of 8.33 % and also the provident fund amount which was also admissible to the deceased at the rate of 8.33 %. We are in agreement with this contention of the learned counsel for the claimants. The clerk of the Ambica Mill was examined and he stated that the deceased was entitled to bonus at the rate of 8.33 % and also to the benefit of provident fund to the extent of 8.33 %. This evidence was given on the basis of the record which could not be successfully challenged or controverted by the Corporation. The question is whether the bonus is to be included in the wages of the deceased or not. It is not in dispute that the deceased was working as Assistant Accountant in Ambica Mill and was governed by the provisions of Payment of Wages Act. Wages have been defined under Section 2(vi) of the Payment of Wages Act, 1936. Section 2(vi)(c) of the Payment of Wages Act provides that wages means interalia any additional remuneration payable under the terms of employment (whether called a bonus or by any other name). Thus, under the provisions of the Payment of Wages Act, additional remuneration payable as bonus to an employee will be included in the definition of wages. Consequently, the tribunal not having considered this legal provision fell in obvious error in refusing the claim of the claimants towards bonus.

##. Likewise from the statement of the clerk of Ambica Mill, it is established that the deceased was entitled to

the benefit of provident fund. No factory or mill or a company can afford not to pay provident fund to its employees. The clerk of the Ambica Mill had stated that the deceased was entitled to provident fund at the rate of 8.33 % of his salary. As such, the tribunal was again in error in not considering this income towards wages of the deceased. Even definition of wages under Section 2(vi) (e) provides that any sum to which the person employed is entitled under any scheme framed under any law for the time being in force will be wages of the employee. The provident fund is paid under different law viz. under the Provident Fund Act and as such, this amount should have been included towards wages of the deceased. Calculated at the rate of 8.33 %, the provident fund comes to Rs.2520/- per year and applying multiplier of 10, it can be worked to Rs.25,000/-. The claim of bonus at Rs.26,880/- is incorrect. If the bonus is calculated at the rate of 8.33 % per annum,the net benefit after applying multiplier of 10, can be worked out to Rs.25,000/- . Thus, the claimants were entitled to Rs.25,000/- towards loss of provident fund and a sum of Rs.25,000/- for loss of bonus which the deceased would have earned if he would have been alive.

##. The tribunal was justified in rejecting the claim of house rent allowance because it was not supported by any evidence nor the clerk of the Ambica Mill supported the claimants on this count.

##. The learned counsel for the claimants contended that important source of income of Rs.2,500/- per annum paid by the Shakti Agency, Ahmedabad and likewise, similar income of Rs.2,500/- paid to the deceased by V.N.Textiles, Ahmedabad were not taken into consideration by the tribunal. It was also contended that sum of Rs.10,000/- per annum paid by the Harmot Agency, Ahmedabad to the deceased was also not taken into consideration. All these claims are afterthoughts. These claims were not set up before the tribunal nor any evidence was adduced on these claims by the claimants. Consequently, the tribunal was justified in refusing all these claims being afterthought and the same cannot be permitted to be allowed in the appeal of the claimants.

##. In view of the above discussions, our calculation of compensation runs as under :-

(1) Loss of dependency benefit Rs.1,68,000=00

(2) Loss of expectancy of life Rs. 10,000=00

(3) Consortium Rs. 10,000=00

(4) Loss of Provident Fund Rs. 25,000=00

(5) Loss of Bonus Rs. 25,000=00

(6) Medical Expenses Rs. 3,600=00

(7) Compensation for pain and suffering Rs. 5,000=00

(8) Taxi Fare Rs. 500=00

(9) Funeral Expenses Rs. 2,000=00

Total Rs.2,49,100=00

##. Since we have already held that the contributory negligence of the deceased was to the extent of 50 %. This amount worked out by us is to be reduced to 50 % which comes to Rs.1,24,550/-, which in our view is reasonable compensation to the claimants.

##. In the result, First Appeal No. 2125 of 1992 succeeds in part only and the finding of the tribunal that the driver of the AMTS bus was liable to the extent of 70 % is modified to 50 %. This appeal thus partly succeeds.

##. The other appeal No.1811 of 1992 also partly succeeds inasmuch as, the appellants in that appeal are entitled to further compensation of Rs.25,000/- towards loss of provident fund and to Rs.25,000/- towards loss of bonus.

##. In the result, the two appeals are partly allowed. In view of above discussions, the claimants respondents No.1 to 3 in First Appeal No. 2125 of 1992 are entitled to net compensation of Rs.1,24,550/- together with interest at the rate of 12 % per annum from the date of filing of the claim petition till payment or realization. The tribunal did not award any cost, hence we do not propose to interfere with that direction of the tribunal. There shall be no order as to costs in these two appeals and the Civil Application. The Civil Application is dismissed for the reasons given above having become infructuous. The compensation so awarded by us shall be

distributed in the ratio in which the tribunal has ordered in its award. Other directions of the tribunal for disbursement subject to the modification above shall remain intact.

[D.C.Srivastava, J.]

Date : / /2000 [H. K. Rathod, J.]

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